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No. 73-666

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN LESLIE PHILLIPS, JR.,
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the Comprehensive Drug Abuse Prevention and Control Act of 1970 goes beyond the power of Congress under the commerce clause, since it proscribes dealing in narcotics whether or not an interstate nexus has been shown in a particular case.

After jury-waived trials in the United States District Court for the Middle District of Tennessee, petitioners were convicted of having distributed heroin and possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1).[1] Petitioner Larkin was convicted on one count and was sentenced to three years'

[1] Petitioners John Leslie Phillips, Jr. and Carolyn L. Phillips were tried jointly. The other petitioners were tried separately.

imprisonment and three years' probation. The other petitioners were each convicted on two counts. Petitioner John Phillips received concurrent sentences of eight years' imprisonment, to be followed by three years' probation. Petitioners Carolyn Phillips, Allen, and Swinger received concurrent sentences of three years' imprisonment and three years' probation. Petitioner McQuiddy received concurrent sentences of six years' imprisonment and three years' probation. Petitioner Ward received a sentence of one year's imprisonment and three years' probation on count 1 and a suspended one-year sentence and five years' probation on count 2. On petitioners' motion, the cases were consolidated on appeal. The court of appeals affirmed (Pet. App.).

The undisputed evidence showed that petitioners sold heroin to government undercover agents in Nashville, Tennessee. Petitioners' sole contention is that the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which they were convicted, is an unconstitutional exercise of Congressional authority because it does not require proof of a nexus with interstate commerce as a condition for conviction. However, all courts of appeals which have considered the question have upheld the statute as a valid exercise of congressional power under the commerce clause. See, *e.g., United States* v. *Lopez,* 459 F. 2d 949 (C.A. 5), certiorari denied *sub nom. Llerena* v. *United States,* 409 U.S. 878; *United States* v. *Rodriguez-Camacho,* 468 F. 2d 1220 (C.A. 9), certiorari denied, 410 U.S. 985. In *Perez* v. *United States,* 402 U.S. 146, this Court reaffirmed prior rulings that the commerce clause can reach wholly intrastate activities where, as a class, those activities have a substantial effect upon interstate commerce. This is so whether or not such a

connection can be shown in any individual situation. There can be little doubt that the Drug Abuse Act deals with matters having a profound effect on interstate commerce. This determination by Congress, reached after extensive examination into the vice of narcotics trafficking, is stated in explicit legislative findings. See 21 U.S.C. 801 (Pet. 2-3). In light of the rational basis for these congressional findings, the Comprehensive Drug Abuse Prevention and Control Act is constitutional.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.